Supreme Court, U. S.
FILED
JUL 23 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O., et al.,
Appellants,

v.

DUANE LARKIN, M.D.,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

APPEAL DOCKETED APRIL 22, 1974
JURISDICTION NOTED JUNE 10, 1974

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7/12/1973	Plaintiff's motion for three-judge court.
7/12/1973	Plaintiff's new motion for temporary restraining order and preliminary injunction, with affidavit.
7/12/1973	Defendants' notice of motion and motion to dismiss.
7/13/1973	Order denying plaintiff's motions for temporary restraining order and leave to commence taking depositions; briefs ordered on plaintiff's motion for preliminary injunction.
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9/27/1973	Plaintiff's motion for temporary restraining order and interlocutory injunction.
10/1/1973	Decision and order granting plaintiff's motion for a three-judge court, denying defendants' motion to dismiss the action, granting plaintiff's motion for temporary restraining order.
10/3/1973	Plaintiff's motion for temporary restraining order, with supporting affidavit.
10/5/1973	Order designating the Honorable F. Ryan Duffy, the Honorable John W. Reynolds, and the Honorable Myron L. Gordon to hear and determine this case.
10/29/1973	Plaintiff's affidavit of Robert H. Friebert in support of motion for preliminary injunction.
11/1/1973	Answer of defendants to amended complaint.
11/1/1973	Defendants' motion to overrule plaintiff's objections to request for admissions.

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12/21/1973	Decision of three-judge court granting plaintiff's motion for preliminary injunction. Defendants are enjoined from enforcing provisions of §448.18 (7), Wis. Stats.
1/17/1974	Plaintiff's interrogatories to defendants.
1/21/1974	Plaintiff's responses to request for admission.
1/30/1974	Defendants' notice of motion and motion for entry of judgment, with supporting memorandum.
1/31/1974	Judgment entered pursuant to decision of December 21, 1973.
2/7/1974	Defendants' objections to interrogatories under Rule 33, FRCP.
3/1/1974	Defendants' notice of appeal to the Supreme Court of the United States, with proof of service.

COMPLAINT. Filed July 6, 1973.
[Document No. 1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DUANE LARKIN, M.D.,
Plaintiff,

v.

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, JR., M.D.;
individually and as members of the Medical
Examining Board of the State of Wisconsin,
Defendants.

Case No. 73-C-360

The plaintiff, by his attorney, alleges and shows to the Court as follows:

1. That the plaintiff brings this action to obtain injunctive relief for a threatened deprivation of rights, privileges and immunities as guaranteed by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

2. That jurisdiction of this action is conferred on this Court by Sec. 1343 of Title 28 of the United States Code and Sec. 1983 of Title 42 of the United States Code.

3. That the plaintiff is a physician and surgeon, is duly licensed under the laws of the State of Wisconsin to practice

medicine in the State of Wisconsin and has established offices at 710 North Sixth Street in the City of Milwaukee, Wisconsin, for the purpose of practicing medicine. The plaintiff is a resident of the State of Michigan.

4. That the defendant, HAROLD WITHROW, D.O., is an adult whose offices are located at the Hustisford Clinic, in Hustisford, Wisconsin and is a member of the Wisconsin Medical Examining Board, hereinafter referred to as "Board".

5. That the defendant, THOMAS HENNEY, M.D., is an adult whose offices are located at 916 Silver Lake Drive, Portage, Wisconsin and is a member of the Board.

6. That the defendant, A. J. SANFELIPPO, M.D., is an adult whose offices are located at 2414 North Farwell Avenue, Milwaukee, Wisconsin and is a member of the Board.

7. That the defendant, JOHN M. IRVIN, M.D., is an adult whose offices are located at the Medical Center of Monroe, Monroe, Wisconsin and is a member of the Board.

8. That the defendant, J. W. RUPEL, M.D., is an adult whose offices are located at the Marshfield Clinic, Marshfield, Wisconsin and is a member of the Board.

9. That the defendant, A. L. FREEDMAN, M.D., is an adult whose offices are located at 122 — 130 East Walnut Street, Green Bay, Wisconsin and is a member of the Board.

10. That the defendant, MARK T. O'MEARA, M.D., is an adult whose offices are located at 815 South 10th Street, LaCrosse, Wisconsin and is a member of the Board.

11. That the defendant, THOMAS W. TORMEY, JR., M.D., is the Secretary of the Board and is an adult whose

principal place of employment is the Medical Examining Board, 201 East Washington, Madison, Wisconsin.

12. That the defendants are sued individually and in their official capacity as members of the Board.

13. That as members of the Board, the defendants supervise and regulate the practice of medicine in the State of Wisconsin as empowered by Chapter 448, Wis. Stats.

14. That the plaintiff, in the fall of 1971, commenced engaging in the City of Milwaukee in the practice of medicine by administering medical treatment to pregnant women in accordance to law including abortions of unborn, unquick feti. Subsequently, the plaintiff commenced an action in the United States District Court for the Eastern District of Wisconsin entitled *Larkin v. McCann, et al,* Case No. 71-C-671 and incorporates that file herein by reference.

15. The plaintiff moved the Court for a Temporary Restraining Order and, on the 23rd day of December, 1971, the Honorable MYRON L. GORDON, District Judge for the Eastern District of Wisconsin executed a Temporary Restraining Order. A copy of that Order is attached as Exhibit A.

16. That Order remains in full force and effect at this time.

17. On the 20th day of June, 1973, the defendant, THOMAS W. TORMEY, JR., M.D., as Secretary of the Board and, upon information and belief, acting on behalf of all of the other defendants, executed a Notice of Investigative Hearing which is scheduled for the 12th day of July, 1973. A copy of that Notice is attached hereto as Exhibit B.

18. That, upon information and belief, contrary to the express language of the Notice that said hearing would be

closed to the public, the defendant, THOMAS W. TORMEY, JR., M.D., as Secretary for the Board and, upon information and belief, acting on behalf of all of the other defendants, issued a statement to the press acknowledging that the plaintiff was being investigated by the Board. A copy of an article which appeared in the Milwaukee Sentinel on June 28, 1973 is attached hereto as Exhibit C.

19. That, the Wisconsin abortion statute, Sec. 940.04, Wis. Stats. is unconstitutional.

20. That, upon information and belief, the defendants have initiated this investigation and have breached the secrecy of said proceedings in an effort to hinder the plaintiff in the practice of medicine and, to punish the plaintiff for administering abortions in the State of Wisconsin, all in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

21. That, the allegations as contained in the Notice of Investigative Hearing does not allege one fact of any substance against DR. LARKIN and is couched in terms which are vague, uncertain and overly broad and which cause persons of ordinary intelligence to guess as to their meaning and scope.

22. That the Board has attempted to enforce the Wisconsin abortion statute in the past against DR. ALFRED KENNAN of Madison but has been restrained from that activity by an order dated May 5, 1971 entered by the Honorable JAMES E. DOYLE, District Judge, Western District of Wisconsin. See *Kennan v. Warren, et al*, Case No. 71-C-132, incorporated herein by reference.

WHEREFORE, the plaintiff demands judgment as follows:

1. That the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors be permanently enjoined from enforcing Sec. 940.04, Wis. Stats. against the plaintiff or any of the plaintiff's employes, agents, servants, attorneys or persons acting under his direction and control or persons in active concert or participation with them by investigating the plaintiff and holding any kind of hearing pursuant to Chapter 448, Wis. Stats. unless the defendants give the plaintiff notice of specific allegations which are not vague, general and overly broad and which are not related to the fact that the plaintiff is engaged in administering abortions in Wisconsin or elsewhere.

2. For a Temporary Restraining Order and for a Preliminary Injunction against the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors enjoining them from enforcing Sec. 940.04, Wis. Stats. against the plaintiff or any of the plaintiff's employes, agents, servants, attorneys or persons acting under his direction and control, or persons in active concert or participation with them by investigating the plaintiff and holding any kind of hearing pursuant to Chapter 448, Wis. Stats. unless the defendants give the plaintiff notice of specific allegations which are not vague, general and overly broad and which are not related to the fact that the plaintiff is engaged in administering abortions in Wisconsin or elsewhere.

3. That the plaintiff recover his costs.

4. For such other further relief as may be proper.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

P. O. ADDRESS:
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-0130

EXHIBIT A TO COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

DUANE LARKIN,

Plaintiff,

vs.

TEMPORARY RESTRAINING ORDER

E. MICHAEL MC CANN, District Attorney of Milwaukee County, Wisconsin, ROBERT W. WARREN, Attorney General of the State of Wisconsin, HAROLD E. BRIER, Chief of Police, Milwaukee, Wisconsin individually and in their official capacity, their agents, servants, employees, attorneys, and persons acting under their direction and control, and persons in active concert or participation with them and their successors,

Defendants.

Upon the motion of the plaintiff, the affidavit of the plaintiff and all of the records, files and proceedings herein the court being advised in the premises,

IT IS HEREBY ORDERED THAT:

The defendants, their agents, servants, employees, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors, be and the same are hereby:

1. Restrained from the enforcement of §940.04 (1), Wisconsin Statutes, against the plaintiff or any of the plaintiff's employees, agents, servants, attorneys or persons acting under his direction and control, or persons in active concert or participation with them.

Dated this 23 day of December, 1971 at Milwaukee, Wisconsin.

BY THE COURT:

/s/ Myron L. Gordon
District Judge

EXHIBIT B TO COMPLAINT

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
MEDICAL EXAMINING BOARD

In the Matter of the Investigation of the Practices of DUANE LARKIN, M.D., Licensee

NOTICE OF INVESTIGATIVE HEARING

To: Duane Larkin, M.D.
710 N. 6th Street, #604
Milwaukee, Wi 53203

PLEASE TAKE NOTICE that in accordance with sec. 448.17, Stats., an investigative hearing will be held by the Medical Examining Board on the 12th day of July, 1973, at 2:00 o'clock in the afternoon of said day, in Room 361, Milwaukee State Office Building, 819 N. 6th Street, Milwaukee, Wisconsin, to determine whether the licensee has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine, and whether he has engaged in conduct detrimental to the best interests of the public.

The investigative hearing will be closed to the public, but the licensee and/or his attorney may be present but will not be permitted to cross-examine witnesses.

Based on the evidence adduced at said investigative hearing the Medical Examining Board will determine whether to warn or reprimand if it finds such practice and whether to institute criminal action or action to revoke license if probable cause therefor exists under criminal or revocation statutes.

Dated at Madison, Wisconsin, this 20th day of June, 1973.

MEDICAL EXAMINING BOARD

By: /s/ Thos. W. Tormey, Jr., M.D.
Thos. W. Tormey, Jr., M.D., Secretary

EXHIBIT C TO COMPLAINT

Milwaukee Sentinel
6-28-73

Medical Unit Summons Dr. Larkin

Dr. Duane Larkin, who officials say operates abortion clinics here and in two other cities, has been summoned to appear at a hearing before the State Board of Medical Examiners, it was learned Wednesday.

Larkin, whose clinics are at 530 W. Wisconsin Ave. and in Detroit and Chicago, according to officials, has been told to appear before the board at 2:45 p.m. July 12 in the State Office Building here.

Dr. Thomas W. Tormey Jr., the board's secretary, confirmed that the hearing was scheduled.

Larkin won a Federal Court restraining order in 1971 protecting him from prosecution in connection with the clinics.

Witnesses have been subpenaed to appear at the hearing, it was learned.

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION. Filed July 6, 1973.
[Document No. 2] [Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney, hereby moves the Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a Temporary Restraining Order and Preliminary Injunction against the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors enjoining them from enforcing Sec. 940.04, Wis. Stats. against the plaintiff or any of the plaintiff's employes, agents, servants, attorneys or persons acting under his direction and control, or persons in active concert or participation with them by investigating the plaintiff and holding any kind of hearing pursuant to Chapter 448, Wis. Stats. unless the defendants give the plaintiff notice of specific allegations which are not vague, general and overly broad and which are not related to the fact that the plaintiff is engaged in adminstering abortions in Wisconsin or elsewhere.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

PLAINTIFF'S MOTION FOR LEAVE TO TAKE DEPOSITIONS PRIOR TO THE EXPIRATION OF THIRTY DAYS. Filed July 6, 1973.
[Document No. 3] [Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, DR. DUANE LARKIN, by his attorney, ROBERT H. FRIEBERT, hereby moves the Court pursuant to Rule 30 (a) of the Federal Rules of Civil Procedure, for an order granting him leave to serve notice of taking of the depositions of all of the defendants in the above captioned case prior to the expiration of thirty (30) days after service of the Summons and Complaint upon them on the ground that these defendants are proceeding with an investigative hearing on July 12, 1973 at 2:00 in the afternoon. Said testimony might be necessary for the Court to rule on the plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction.

Dated at Milwaukee, Wisconsin this 6th day of July, 1973.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

AMENDED COMPLAINT. Filed July 12, 1973.
[Document No. 4]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FIRST CAUSE OF ACTION

The plaintiff, by his attorney, alleges and shows to the Court as follows:

1. That the plaintiff brings this action to obtain injunctive and declaratory relief for a threatened deprivation of rights, privileges and immunities as guaranteed by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

2. That jurisdiction of this action is conferred on this Court by Sections 1343, 2201 and 2281, et *seq.* of Title 28 of the United States Code and Sec. 1983 of Title 42 of the United States Code.

3. That the plaintiff is a physician and surgeon, is duly licensed under the laws of the State of Wisconsin to practice medicine in the State of Wisconsin and has established offices at 710 North Sixth Street in the City of Milwaukee, Wisconsin, for the purpose of practicing medicine. The plaintiff is a resident of the State of Michigan.

4. That the defendant, HAROLD WITHROW, D. O., is an adult whose offices are located at the Hustisford Clinic, in Hustisford, Wisconsin and is a member of the Wisconsin Medical Examining Board, hereinafter referred to as "Board".

5. That the defendant, THOMAS HENNEY, M.D., is an adult whose offices are located at 916 Silver Lake Drive, Portage, Wisconsin and is a member of the Board.

6. That the defendant, A. J. SANFELIPPO, M.D., is an adult whose offices are located at 2414 North Farwell Avenue, Milwaukee, Wisconsin and is a member of the Board.

7. That the defendant, JOHN M. IRVIN, M.D., is an adult whose offices are located at the Medical Center of Monroe, Monroe, Wisconsin and is a member of the Board.

8. That the defendant, J. W. RUPEL, M.D., is an adult whose offices are located at the Marshfield Clinic, Marshfield, Wisconsin and is a member of the Board.

9. That the defendant, A. L. FREEDMAN, M.D., is an adult whose offices are located at 122 - 130 East Walnut Street, Green Bay, Wisconsin and is a member of the Board.

10. That the defendant, MARK T. O'MEARA, M.D., is an adult whose offices are located at 815 South 10th Street, LaCrosse, Wisconsin and is a member of the Board.

11. That the defendant, THOMAS W. TORMEY, JR., M.D., is the Secretary of the Board and is an adult whose principal place of employment is the Medical Examining Board, 201 East Washington, Madison, Wisconsin.

12. That the defendants are sued individually and in their official capacity as members of the Board.

13. That as members of the Board, the defendants supervise and regulate the practice of medicine in the State of Wisconsin as empowered by Chapter 448, Wis. Stats.

14. That the plaintiff, in the fall of 1971, commenced engaging in the City of Milwaukee in the practice of medicine by administering medical treatment to pregnant women in accordance to law including abortions of unborn, unquick feti. Subsequently, the plaintiff commenced an action in the United States District Court for the Eastern District of Wisconsin

entitled *Larkin v. McCann, et al.* Case No. 71-C-671 and incorporates that file herein by reference.

15. The plaintiff moved the Court for a Temporary Restraining Order and, on the 23rd day of December, 1971, the Honorable MYRON L. GORDON, District Judge for the Eastern District of Wisconsin executed a Temporary Restraining Order. A copy of that Order is attached as Exhibit A.

16. That Order remains in full force and effect at this time.

17. On the 20th day of June, 1973, the defendant, THOMAS W. TORMEY, JR., M.D., as Secretary of the Board and, upon information and belief, acting on behalf of all of the other defendants, executed a Notice of Investigative Hearing which is scheduled for the 12th day of July, 1973. A copy of that Notice is attached hereto as Exhibit B.

18. That, upon information and belief, contrary to the express language of the Notice that said hearing would be closed to the public, the defendant, THOMAS W. TORMEY, Jr., M.D., as Secretary for the Board and, upon information and belief, acting on behalf of all of the other defendants, issued a statement to the press acknowledging that the plaintiff was being investigated by the Board. A copy of an article which appeared in the Milwaukee Sentinel on June 28, 1973 is attached hereto as Exhibit C.

19. That, the Wisconsin abortion statute, Sec. 940.04, Wis. Stats. is unconstitutional.

20. That, upon information and belief, the defendants have initiated this investigation and have breached the secrecy of said proceedings in an effort to hinder the plaintiff in the practice of medicine and, to punish the plaintiff for administering abortions in the State of Wisconsin, all in violation of

rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

21. That, the allegations as contained in the Notice of Investigative Hearing does not allege one fact of any substance against DR. LARKIN and is couched in terms which are vague, uncertain and overly broad and which cause persons of ordinary intelligence to guess as to their meaning and scope.

22. That the Board has attempted to enforce the Wisconsin abortion statute in the past against DR. ALFRED KENNAN of Madison but has been restrained from that activity by an order dated May 5, 1971 entered by the Honorable JAMES E. DOYLE, District Judge, Western District of Wisconsin. See *Kennan v. Warren, et al,* Case No. 71-C-132, incorporated herein by reference.

SECOND CAUSE OF ACTION

As and for a Second Cause of Action, the plaintiff, by his attorney, alleges and shows to the Court as follows:

1. The plaintiff realleges each and every allegation contained in the First Cause of Action and incorporates them herein by reference.

2. The proceedings of the Medical Examining Board as instituted against the plaintiff and as authorized by Chapter 448, Wis. Stats., a copy of which is attached hereto as Exhibit D, are unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution in that:

(a) The phrases "inimical to the public health", "conduct unbecoming a person licensed to practice medicine" and "conduct detrimental to the best interests of the

public" are vague, overly broad and cause men of reasonable intelligence to guess as to their meaning and effect thereby depriving the plaintiff of notice of prohibited practices as well as providing the defendants with authority to investigate and warn, reprimand or institute criminal actions for activities of the plaintiff which are protected by the Constitution of the United States of America.

(b) The Notice of Investigative Hearing, Exhibit B, states that at the conclusion of the hearing the Board will determine whether to warn or reprimand the plaintiff or whether the Board will institute criminal actions or actions to revoke license if they conclude that probable cause exists and, said notice prohibits the plaintiff and his attorney from cross examining any of the witnesses against him and from in any way appearing in these hearings in a meaningful fashion thereby subjecting the plaintiff to punishment and official condemnation without being afforded his right to be confronted by the witnesses against him, without being afforded his right to notice of the nature of the charges against him, without being afforded the opportunity to produce witnesses on his behalf, without being afforded the compulsory process for witnesses, and without being afforded a trial by jury or by persons other than his accusers, all in violations of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(c) The Medical Examining Board of the State of Wisconsin has not promulgated any rules with respect to the conduct of these proceedings. Thus, the proceedings will be regulated on an *ad hoc* basis in violation of due process of law because there are no rules to determine what process is due the plaintiff.

(d) The Notice of Investigative Hearing states that a criminal action will be brought against the plaintiff if the Board finds probable cause under the criminal statutes of the State of Wisconsin. This proceeding denies

to the plaintiff the right to have a determination of probable cause made by an impartial, neutral, independent and detached judicial officer or by a grand jury, in violation of rights guaranteed to him by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

3. These proceedings as embodied in the Notice of Investigative Hearing are brought pursuant to authority which appears in Sec. 448.17 and 448.18, Wis. Stats. These statutes authorize the Board to warn, reprimand, determine probable cause, suspend a license, and temporarily suspend a license and, such statutory scheme is in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution as more particularly set forth in the preceding paragraph.

WHEREFORE, the plaintiff demands judgment as follows:

1. That a judgment be entered declaring the procedures employed by the defendants as members of the Medical Examining Board of the State of Wisconsin as embodied in the Notice of Investigative Hearing, Exhibit B, and Sections 448.17 and 448.18, Wis. Stats. to be unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

2. That a judgment be entered declaring that the actions of the defendants as applied to the plaintiff are unconstitutional and in violation of rights guaranteed to the plaintiff by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

3. That the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control and persons acting in active concert or participation with

them and their successors be permanently enjoined from enforcing Sec. 940.04, Wis. Stats. against the plaintiff or any of the plaintiff's employes, agents, servants, attorneys or persons acting under his direction and control or persons in active concert or participation with them.

4. That the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors be permanently enjoined from investigating the plaintiff under the procedures as outlined in the Notice of Investigative Hearing and under the authority of Sections 448.17 and 448.18, Wis. Stats. and the procedures contained therein.

5. For a Temporary Restraining Order and for a Preliminary Injunction against the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors enjoining them from investigating the plaintiff under the procedures as outlined in the Notice of Investigative Hearing and under the authority of Sections 448.17 and 448.18, Wis. Stats. and the procedures contained therein.

6. That the plaintiff recover his costs.

7. For such other further relief as may be proper.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

EXHIBITS A, B, AND C TO AMENDED COMPLAINT

These exhibits are identical to Exhibits A, B, and C to the Complaint filed July 6, 1973, which are printed at pages 12-15 of this Appendix.

EXHIBIT D TO AMENDED COMPLAINT

Photocopy of Chapter 448 of the Wisconsin Statutes
[Omitted in printing.]

PLAINTIFF'S MOTION FOR THREE-JUDGE COURT

Filed July 12, 1973. [Document No. 5]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney, hereby moves the Court pursuant to the provisions of 28 U.S.C. Sec. 2281, *et seq.* for the convening of a three-judge court in the above captioned case.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, WITH AFFIDAVIT. Filed July 12, 1973.

[Document No. 6] [Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney, hereby moves the Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a Temporary Restraining Order and Preliminary Injunction against the defendants, their agents, servants, employes, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them, and their successors enjoining them from investigating

the plaintiff under the procedures as outlined in the Notice of Investigative Hearing and under the authority of Sections 448.17 and 448.18, Wis. Stats. and the procedures contained therein.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT
Attorney for the Plaintiff

[Title omitted in printing.] AFFIDAVIT

STATE OF WISCONSIN)
) SS.
MILWAUKEE COUNTY)

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says that:

1. He is the attorney for the plaintiff Dr. Duane Larkin.

2. Attached to this Affidavit is a copy of an article which appeared in the Milwaukee Journal on Friday, July 13, 1973 which discloses that the defendant Dr. John Irvin, the chairman of the Medical Examining Board of the State of Wisconsin consented to an interview with reporters and that in this interview Dr. Irvin acknowledged that there was an investigation of the plaintiff in progress, that the information of any such hearing will be released at a later date when a decision is made and the professions of witnesses which were scheduled to appear and their relationship to Dr. Larkin.

3. The plaintiff did not consent to any such publicity or release of any information whatsoever to the public as is disclosed in the same article's reference to your client's refusal to talk to the reporter.

4. This Affidavit is made in support of a motion for a preliminary injunction.

Dated at Milwaukee, Wisconsin, this 16th day of July, 1973.

/s/ Robert H. Friebert
Robert H. Friebert

[Jurat omitted in printing.]

Abortionist Probe Hears 8 Testify

Further investigative hearings into the medical practices of Dr. Duane Larkin, a Michigan resident who operates an abortion clinic here, are expected to be held this summer, possibly in Milwaukee and Madison, according to the chairman of the state Medical Examiners Board, Dr. John M. Irvin.

The board is expected to end two days of hearings here Friday, but no results are likely until additional witnesses are called to testify, Irvin said.

Dr. Duane Larkin

Larkin did not appear at the closed hearing at the State Office Building Thursday. Eight witnesses, including former employes of Larkin, two newspaper reporters and the board's investigator, George W. Bendrick, testified.

The board, a licensing investigative and regulatory body, licenses physicians.

Hearings Closed

According to the notice of the hearing sent to Larkin, the purpose of the hearing was "to determine whether (Larkin) has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine and whether he has engaged in conduct detrimental to the best interests of the public.

The hearings are closed because information, possibly hearing on the physician's reputation, is not to be released until a decision is made, Irvin said. All witnesses gave sworn testimony and appeared without attorneys, the witnesses said.

Witnesses said questions

Turn to Larkin, page 7, col. 6

Larkin

Abortionist-Doctor Absent as State Hearing Nears End

From page 1

from the board and Asst. Atty. Gen. LeRoy L. Dalton focused on sanitary conditions at Larkin clinics the alleged use of pseudonyms by doctors and the type of counseling provided patients.

Linda Majchszak, 2754 N. Hackett Ave., who said she worked in the fall of 1971 in Larkin's former clinic at 710 N. Plankinton Ave., said she told the board she knew Larkin personally only as "Dr. Johnson."

Miss Majchszak told a reporter that all blood and fetuses were washed down the drain of one sink at that clinic. She said surgical instruments were sterilized in a machine.

A secretary for Towne Realty, which leased space to Larkin for the Plankinton Ave. clinic and which currently is leasing space for his Biogenetics clinic, at 710 N. 6th, said Larkin's 1971 lease was signed "Dr. Johnson."

The secretary, Janette Wilkum, said Larkin kept doors to the Plankinton Ave. clinic padlocked and brought in his own cleaning crew. She said reception rooms at the clinic "were in excellent condition" and that Larkin said the regular building

building maintenance people would not do a thorough enough cleaning job.

Both reporters who had been subpenaed told a reporter that the board asked them to verify under oath information in published stories.

Miss Nina Bernstein, of The Milwaukee Journal, and Mary Zahn (Mrs. Mary Hanin) of The Milwaukee Sentinel, said they were asked no questions that would have compromised the confidentiality of news sources.

The Rev. Elinor Yeo, of Clergy Consultation, said the board asked the names of agencies that referred patients to Larkin. She said she had traced "a number of ads in the paper which all led to his doorstep."

Larkin's attorney, Robert Friebert, who was present during the hearing, refused comment. He denied that a hearing regarding Larkin was taking place. Asked about Larkin's whereabouts, Friebert laughed.

One physician reportedly testified Friday morning. A doctor and a nurse, former Larkin associates, were expected to testify in the afternoon, according to Irvin.

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS. Filed July 12, 1973. [Document No. 7]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

NOTICE OF MOTION

To: Robert H. Friebert
Plaintiff's Attorney
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203

PLEASE TAKE NOTICE that the undersigned will bring a motion to dismiss the action on for hearing before this court at a date, time, and location to be determined and fixed by order of the court.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ Le Roy L. Dalton
LEROY L. DALTON
Assistant Attorney General
of Wisconsin

Attorneys for Defendants

MOTION TO DISMISS

Come now the defendants, Harold Withrow, Thomas Henney, A. J. Sanfelippo, John M. Irvin, J. W. Rupel, A. L. Freedman, Mark T. O'Meara, and Thomas W. Tormey, by their attorneys, Robert W. Warren, Attorney General of the State of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of the State of Wisconsin, and move the court to dismiss the entitled matter for failure to state a cause of action within the meaning of 42 U.S.C. 1983 or any other federal

statute or any provisions of the Constitution of the United States for the reason that it shows upon the face of the complaint filed herein that the plaintiff has:

(1) Failed to identify a State of Wisconsin statute which allegedly violates plaintiff's constitutional rights;

(2) Failed to allege facts which would constitute a substantial federal question.

Dated at Madison, Wisconsin, this 11th day of July, 1973.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ Le Roy L. Dalton
LE ROY L. DALTON
Assistant Attorney General
of Wisconsin

Attorneys for Defendants

ORDER DENYING MOTIONS FOR TEMPORARY RESTRAINING ORDER AND LEAVE TO COMMENCE TAKING DEPOSITIONS; BRIEFS ORDERED ON MOTION FOR PRELIMINARY INJUNCTION.
Filed July 13, 1973. [Document No. 8]
[Title omitted in printing.]

ORDER

The court has examined the complaint, motion for temporary restraining order and preliminary injunction, and motion for leave to take depositions prior to the expiration of thirty days which have been filed in this action. I do not believe that the facts alleged in the complaint are sufficient to warrant granting the latter motion or that portion of the former motion

seeking a temporary restraining order. The parties will be given an opportunity to present authorities with respect to the preliminary injunction application.

Therefore, IT IS ORDERED that the plaintiff's motions for a temporary restraining order and leave to commence taking depositions be and hereby are denied.

IT IS FURTHER ORDERED that the plaintiff shall have until July 23, 1973 to serve and file a brief in support of his motion for preliminary injunction; the defendants shall have until August 3, 1973 to serve and file a brief in opposition; and the plaintiff shall have until August 8, 1973 to serve and file a brief in reply.

Dated at Milwaukee, Wisconsin, this 13 day of July, 1973.

/s/Myron L. Gordon
U. S. District Judge

ORDER DENYING TEMPORARY RESTRAINING ORDER. Filed July 18, 1973. [Document No. 9]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ORDER

In an order dated July 13, 1973, I denied the plaintiff's motion for a temporary restraining order and his motion for leave to commence discovery. A briefing schedule on the plaintiff's motion for preliminary injunction was established.

The defendants have moved to dismiss the action for failure to state a claim. The plaintiff, however, has filed an amended complaint, a new motion for a temporary restraining order and

preliminary injunction, and a motion to convene a three-judge court.

The request for a temporary restraining order will again be denied. The briefing schedule established for the original motion for a preliminary injunction will remain in effect for the new motion. Consideration of the plaintiff's application for the convening of a three-judge court will await determination of the issues raised by the other motions.

The plaintiff's amended complaint appears to correct at least part of the deficiency asserted in the defendants' motion to dismiss; however, I will treat that motion as applicable to the amended complaint if the defendants so wish. Although a memorandum was filed with the motion, that action was taken on fairly short notice; I believe the defendants should have an opportunity to develop their arguments more fully. Of course, the defendants may file a new motion to dismiss or elect not to proceed at all in that manner if they choose.

Therefore, IT IS ORDERED that the plaintiff's motion for a temporary restraining order be and hereby is denied.

IT IS FURTHER ORDERED, in the event the defendants elect to proceed on their original motion to dismiss, that the parties serve and file any briefs they wish to submit with respect to that motion as follows:

The defendants shall have until July 28, 1973, for a supporting brief; the plaintiff shall have until August 8, 1973, to answer; and the defendants shall have until August 13, 1973, to reply. If the defendants wish to file a new motion to dismiss, it should be filed, with a supporting brief, by July 28, 1973; in that event, the rest of the briefing schedule will remain unchanged.

Dated at Milwaukee, Wisconsin, this 18th day of July, 1973.

/s/ Myron L. Gordon
U. S. District Judge /s/ TSJ

AFFIDAVIT OF ROBERT H. FRIEBERT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

Filed July 24, 1973. [Document No. 10]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN)
) SS.
MILWAUKEE COUNTY)

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says:

1. That he is the attorney for the plaintiff, DR. DUANE LARKIN.

2. Attached to this Affidavit is a copy of a letter received by your affiant on July 20, 1973 from the attorney for the defendants.

3. This Affidavit is made in support of the Motion for a Preliminary Injunction.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT

[Jurat omitted in printing.]

[Letterhead omitted in printing.]

July 19, 1973

Mr. Robert H. Friebert
Attorney at Law
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203

Dear Mr. Friebert:

Re: *In the Matter of the Investigation of the Practices of DUANE LARKIN, M.D., Licensee*

I have your letter of July 16, 1973, with the enclosures. I have responded to your affidavit by sending a letter to Judge Gordon, a copy of which is attached hereto.

I am somewhat disturbed by your tactic of including alleged facts and argument in letters to me and sending copies to Judge Gordon where you have an application pending for a preliminary injunction in his court.

I am especially disturbed by the misstatements and partial statements implying that the subject matter of the hearing is several years old and that any objectionable practices have long ago been abandoned.

I don't know how you could sit through the hearings and help but know that the total subject matter of Dr. Larkin's practice in Milwaukee is less than two years old and that witnesses testified about events occurring in 1972 and 1973. If your motivation is to attempt to influence Judge Gordon by these misstatements, I think it is reprehensible.

As to the statutory provisions which your client may or may not have violated, I suggest that you examine the various provisions of ch. 448 of the statutes dealing with the conduct of licensed physicians.

As you were advised previously, if Dr. Larkin wishes to come before the Board and explain any of the evidence which has been presented, he will be allowed to do so at the adjourned investigative hearing.

Very truly yours,

/s/ Le Roy L. Dalton
LeRoy L. Dalton
Assistant Attorney General

LLD:up

AMENDED MOTION TO DISMISS.
Filed July 30, 1973. [Document No. 13]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

COME NOW the defendants, Harold Withrow, Thomas Henney, A. J. Sanfelippo, John M. Irvin, J. W. Rupel, A. L. Freedman, Mark T. O'Meara, and Thomas W. Tormey, Jr., by their attorneys, Robert W. Warren, Attorney General of the State of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of the State of Wisconsin, and move the court to dismiss the entitled matter for failure to state a cause of action within the meaning of 42 U.S.C. §1983 or any other federal statute or any provisions of the Constitution of the United States for the reason that it shows upon the face of the amended complaint filed herein that the plaintiff has:

(1) Failed to allege facts which would constitute a substantial federal constitutional question; all within the meaning of Rule 12 (b) (1) and 12 (b) (6), Federal Rules of Civil Procedure.

(2) Failed to show that any alleged constitutional rights will not be protected before the Medical Examining Board and any subsequent court proceedings.

Dated at Madison, Wisconsin, this 27th day of July, 1973.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ Le Roy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

Attorneys for Defendants

AFFIDAVIT OF ROBERT H. FRIEBERT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.
Filed July 30, 1973. [Document No. 14]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says:

1. That he is the attorney for the plaintiff, DR. DUANE LARKIN.

2. Attached hereto are copies of newspaper articles which appeared in The Milwaukee Journal on Thursday, July 26, 1973 and which disclose the content of the Motion filed under Rule 36 and also disclose a quote from one of the defendants, DR. TORMEY, to the effect that it is the position of the Medical Examining Board in a case involving another doctor not to make public statements.

3. That this Affidavit is made in support of the Motion for a Temporary Restraining Order and Preliminary Injunction.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT

[Jurat omitted in printing.]

MILWAUKEE JOURNAL

July 26, 1973

State Says Abortionist Used Alias

By Nina Bernstein
of The Journal Staff

The State Medical Examining Board filed a list of allegations concerning abortionist Dr. Duane Larkin in Federal Court Thursday and asked that he agree that they are accurate.

The allegations include:

That Larkin used the name Dr. Glen Johnson to sign a lease for his abortion clinic, formerly at 710 N. Plankinton Ave., and the same pseudonym in his medical practice during September, 1971.

State law forbids doctors to practice medicine under assumed names.

That he knowingly employed physicians in his clinic who used pseudonyms, some

Turn to Larkin, page 12, col. 1

Larkin

Abortionist Used Alias, Board Says

From page 1

of whom were not licensed to practice medicine in Wisconsin.

That an abortion referral agency, known at different times as Wisconsin Family Planning, Haven Midwest and Women's Medical Group, has received 20% of Larkin's abortion fees on patients referred to him by the agency.

The action Thursday was filed in connection with a Federal Court lawsuit begun July 6 by Larkin to try to halt an investigation into his practices by the examining board. Federal Judge Myron L. Gordon denied a request for an immediate halt to the board's examination, and the suit is still pending.

The requested stipulations are part of normal court procedure, in which both parties in a suit try to agree on certain issues before the trial and thus limit court time to disputed facts.

Hearing Underway

The examining board, which is a medical licensing and regulatory body, is conducting the

Dr. Duane Larkin

hearing to determine whether Larkin has engaged in conduct unbecoming a person licensed to practice medicine in Wisconsin or detrimental to the best interests of the public.

Larkin, a Michigan resident, has operated an abortion clinic in Milwaukee since 1971.

According to the papers filed Thursday, Larkin hired Dr. Krisha Murthy to treat patients at the clinic although Murthy's temporary educational permit limited his medical activities to graduate training at Mount Sinai Medical Center.

Another doctor treating patients at the clinic, Dr. Young W. Ahn, was not licensed to practice medicine in Wisconsin, according to the board.

3 Pseudonyms Cited

Three doctors employed by Larkin between September, 1971, and February, 1973, used the pseudonym Dr. Park, Dr. Rhee and Dr. Kamun, the papers said.

Since Feb. 1, 1973, the papers said, Larkin has employed Dr. Benjamin M. Victoria Jr. to perform abortions, paying him 18% of the fee paid by the patient in cash each Saturday.

Neither Larkin nor his attorney, Robert Friebert, could be reached for comment.

THE MILWAUKEE JOURNAL

Thursday, July 26, 1973

Doctors Ask Publicity of Reprimands

Madison, Wis. –AP– The State Medical Society of Wisconsin criticized the Wisconsin Medical Examining Board Wednesday for not publicizing the board's reprimand of a Madison neurosurgeon, Dr. Henry M. Suckle.

"When disciplinary action against a member of the profession is warranted, we believe the action should be undertaken in such a way as to protect the public, not the physician," the society's secretary, Earl R. Thayer, said in a letter written at the direction of its Board of Directors.

"Thus a public reprimand should be widely disseminated, immediately," said the letter to Dr. Thomas W. Tormey, executive secretary of the board.

The board decided June 19 to "publicly" reprimand Suckle as a result of a complaint filed by the Dane County Medical Society last year, but the board did not tell newsmen.

The story came out about a week later, after a source told the Madison Capital Times and the newspaper had a reporter confirm it.

"We don't promote trouble in our profession," Tormey told a reporter when asked to explain the silence.

AFFIDAVIT OF ROBERT H. FRIEBERT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

Filed September 20, 1973. [Document No. 18]

[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN)
) SS.
MILWAUKEE COUNTY)

ROBERT H. FRIEBERT being first duly sworn, on oath, deposes and says that:

1. He is the attorney for the plaintiff DUANE LARKIN, M.D.

2. Attached to this Affidavit is a copy of a Notice of Contested Hearing which Notice indicates that the defendants in the above entitled action have scheduled a hearing on October 4, 1973 with respect to the plaintiff and, the defendants will determine at that time whether to suspend the license of the plaintiff pursuant to the provisions of Sec. 448.18 (7), Wis. Stats.

3. This Affidavit is made in support of a Motion for a Temporary Restraining Order and Preliminary Injunction.

Dated at Milwaukee, Wisconsin this 20th day of September, 1973.

/s/ Robert H. Friebert
Robert H. Friebert

[Jurat omitted in printing.]

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
MEDICAL EXAMINING BOARD

In the Matter of the Alleged Unprofessional Conduct of DUANE LARKIN, M.D., Licensee.	NOTICE OF CONTESTED HEARING

To: Duane Larkin, M.D.
536 West Wisconsin Avenue
Milwaukee, Wisconsin

TAKE NOTICE that a contested hearing will be held on the Board's own motion on October 4, 1973, at 1:30 p.m., or as soon thereafter as counsel can be heard, in Room 252 of the new State Office Building, 201 East Washington Avenue, Madison, Wisconsin, to determine whether the licensee has practiced medicine in the State of Wisconsin under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice medicine in this state, which practicing has operated to unfairly compete with another practitioner, to mislead the public as to identity, or to otherwise result in detriment to the profession or the public, and more particularly, whether the said Duane Larkin, M.D., has practiced medicine in this state since September 1, 1971, under the name of Glen Johnson.

TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the licensee has permitted persons to practice medicine in this state in violation of sec. 448.02 (1), Stats., more particularly whether the said Duane Larkin, M.D., permitted Young Wahn Ahn, M.D., an unlicensed physician, to perform abortions at his abortion clinic during the year 1972.

TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the said Duane Larkin, M.D., split fees with other persons during the years 1971, 1972, and 1973 in violation of sec. 448.23 (1), Stats.

Based on the evidence adduced at said contested hearing, the Medical Examining Board will determine whether to suspend the license of the said Duane Larkin, M.D., under the authority of sec. 448.18 (7), Stats.

Dated at Madison, Wisconsin this 18 day of September, 1973.

MEDICAL EXAMINING BOARD

By: /s/ Thos. W. Tormey, Jr., M.D.
Thos. W. Tormey, Jr., M.D., Secretary

MOTION FOR TEMPORARY RESTRAINING ORDER AND INTERLOCUTORY INJUNCTION.
Filed September 27, 1973. [Document No. 19]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney Robert H. Friebert, hereby moves the court pursuant to Rule 65 of the Federal Rules of Civil Procedure and pursuant to the provisions of 28 U.S.C. Sec. 2284 (3) for a temporary restraining order and an interlocutory injunction against the defendants, their agents, servants, employees, attorneys and persons acting under their direction and control, and persons acting in active concert or participation with them and their successors restraining and enjoining them from proceeding with the contested hearing scheduled to commence on October 4, 1973 and from in any way enforcing the provisions of Sec. 448.18 (7), Wis. Stats. against the plaintiff or any of the plaintiff's employees,

agents, servants, attorneys or persons in active concert or participation with them on the grounds that the holding of this hearing and the enforcement of the provisions of Sec. 448.18 (7), Wis. Stats. will irrevocably harm the plaintiff as is more fully set forth in the affidavits and briefs previously filed herein.

Dated this 26th day of September, 1973.

/s/ Robert H. Friebert
Robert H. Friebert

DECISION AND ORDER, GRANTING REQUEST FOR THREE-JUDGE COURT, DENYING MOTION TO DISMISS, AND GRANTING TEMPORARY RESTRAINING ORDER.
Filed October 1, 1973. [Document No. 20]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DUANE LARKIN, M.D.,
Plaintiff,

v.

HAROLD WITHROW, D.O.; THOMAS HENNEY, M.D.; A. J. SANFELIPPO, M.D.; JOHN M. IRVIN, M.D.; J. W. RUPEL, M.D.; A. L. FREEDMAN, M.D.; MARK T. O'MEARA, M.D.; THOMAS W. TORMEY, JR., M.D.; individually and as members of the Medical Examining Board of the State of Wisconsin.
Defendants.

Case No. 73-C-360

DECISION AND ORDER

The plaintiff, a licensed physician who performs abortions in this state, brought this action against the members of the state medical examining board for injunctive relief pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343.

The complaint alleged that an investigative hearing had been initiated concerning Dr. Larkin, but that the notice thereof failed to disclose any specific allegations of misconduct. It was further alleged, upon information and belief, that the investigation was launched in order to punish the plaintiff for performing abortions.

A motion for a temporary restraining order, filed with the complaint, was denied. I concluded that the plaintiff's complaint was insufficient to justify interference with the examining board's attempt to perform its statutory investigative duty. The plaintiff was given the opportunity, however, to submit memoranda with respect to his motion for a preliminary injunction.

Following a motion to dismiss filed by the defendants, the plaintiff amended his complaint to challenge the constitutionality of the statutes authorizing the examining board to act. A request to convene a three-judge court and a motion for a temporary restraining order or preliminary injunction were also filed. The defendants amended their motion to dismiss so as to make it applicable to the amended complaint.

The plaintiff's motion for a temporary restraining order was again denied. Although I believed then, as I do now, that there is a serious question as to the validity of legislation which allows an examining board both to rule on *and* to punish for charges evolving from its own investigation, that

question was not presented at that time. The challenge was only to the activity then being engaged in by the board, which was investigation.

Again, however, the plaintiff was given the opportunity to submit authorities in support of his position, and the defendants were allowed to brief the motion to dismiss. It was anticipated that the arguments presented by the parties would also be helpful toward resolving the question of whether a three-judge court was required.

Since that time, the status of this action has changed radically. The board is no longer engaged in an investigative proceeding, for it has notified the plaintiff that it has scheduled a "contested hearing" at which it will determine whether his license should be temporarily suspended. The board's current action makes all allegations of the plaintiff's amended complaint germane. The positions of the parties can no longer be assessed in terms of a limited challenge involving only investigative proceedings; the board's present action calls into play all challenges to the statutory scheme as detailed in the plaintiff's complaint.

The first inquiry must be whether to request the convening of a three-judge court. Literature, Inc. v. Quinn, — F. 2d — (1st Cir., Case number 73-1074, decided July 26, 1973). That inquiry is limited to "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962). Since the same issues are involved, that inquiry should also resolve a motion to dismiss.

The prayer of the amended complaint seeks a declaration of unconstitutionality of sections 448.17 and 448.18 of the

Wisconsin statutes. It also seeks injunctive relief with respect to those statutes. Clearly a formal basis for equitable relief is stated, and the case comes within the requirements of 28 U.S.C. §2281, *et seq.* The question then is whether the constitutional claim is substantial.

Procedural due process provisions are required in instances where a person stands to see significant interference with his property rights or his liberty. Board of Regents v. Roth, 408 U.S. 564 (1972). Interference with a physician's ability to practice his profession would surely qualify as an interference with a property right. It is certainly "a sufficiently direct threat of personal detriment". Doe v. Bolton, 410 U.S. 179, 188 (1973). Suspension of his license to practice medicine, as the result of charges of improper conduct, presumptively has a serious adverse effect on the physician's reputation. Thus, it is clear that the plaintiff's liberty is also at stake. 408 U.S. at 573. "There is little doubt but that a person's interest in his reputation is sufficient to trigger procedural due process protection." Suarez v. Weaver, — F. 2d — (7th Cir., Case number 72-1656, decided September 14, 1973). *See also* Wisconsin v. Constantineau, 400 U.S. 433 (1971); and Weiman v. Updegraff, 344 U.S. 183 (1952).

The issue then becomes narrowed to whether an arguably meritorious question exists with respect to whether the provisions of sections 448.17 and 448.18 of the Wisconsin statutes satisfy due process requirements.

Section 448.17 gives the board authority to "investigate, hear and act upon practices by persons licensed to practice medicine and surgery. . . ." It also provides that the board, following investigation, may warn, reprimand, or institute

criminal or revocation proceedings. Section 448.18 concerns the procedures for revocation of a physician's license. Although revocation, like a criminal proceeding, can only be accomplished through an action prosecuted by a district attorney, temporary suspension may be ordered by the board itself. Section 448.18 (7) provides that a physician's license may be suspended, for up to two consecutive three-month periods, "without formal proceedings . . . where he is known or the examining board has good cause to believe" that he has violated another subsection of the statute defining proscribed conduct.

In several cases involving hearings required by due process, the Supreme Court has delved into the area of minimal requirements. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the court reaffirmed the principle of Morrissey v. Brewer, 408 U.S. 471 (1972), that one of the minimum elements of such hearings is "an independent decisionmaker". 411 U.S. at 786. Under sections 447 and 448, it appears that the examining board is authorized not only to investigate physicians and present charges, but to rule on those charges and impose punishment, at least to the extent of reprimanding or temporarily suspending. The latter sanction is the one now threatening the plaintiff, and, since it may occur without the intervention of an independent neutral and detached decisionmaker, I find that the plaintiff has raised at least one substantial constitutional question. Other issues are also presented; however, only one such issue need be assessed as not insubstantial in order to warrant invocation of a three-judge court. Thus, I do not reach the plaintiff's other challenges.

The defendants suggest that there is no real problem presented here, because any action taken by the board is

subject to review pursuant to chapter 227 of the Wisconsin statutes. It should be noted, however, that the plaintiff is challenging the propriety of the board's statutory authority; review statutes deal only with the propriety of the *exercise* of authority. Furthermore, the defendants' argument really presents an issue of abstention, and the resolution of that matter, at least on the facts of this case, should await determination by the three-judge court. See Goosby v. Osser, 409 U.S. 512, 522-23 (1973); Literature, Inc. v. Quinn, — F. 2d — (1st Cir., Case number 73-1074, decided July 26, 1973).

I conclude, therefore, that the plaintiff's motion to request the convening of a three-judge court should be granted. The request will be forwarded to the chief judge of this circuit upon filing of this decision and order. It follows that the motion to dismiss will be denied.

Since I am requesting a three-judge court, resolution of the plaintiff's motion for a preliminary injunction should be made by the panel. The plaintiff has renewed his motion for a temporary restraining order, and such motion will now be granted. The motion seeks to enjoin the defendants from proceeding with the contested hearing and from attempting temporarily to suspend the plaintiff's license pursuant to section 448.18 (7). I believe that the likelihood of success of the plaintiff's challenge and the threat of irreparable harm following from suspension, coupled with the lack of prejudice to the defendants, justify preserving the status quo until the three-judge court is prepared to act.

Therefore, IT IS ORDERED that the defendants' motion to dismiss the action be and hereby is denied.

IT IS ALSO ORDERED that the plaintiff's motion for a temporary restraining order be and hereby is granted. The defendants are hereby enjoined from proceeding with the contested hearing involving the plaintiff herein, currently scheduled for October 4, 1973, and are also enjoined from attempting to enforce the provisions of §448.18 (7), Wis. Stats., against the plaintiff, all until further order of the court.

Dated at Milwaukee, Wisconsin, this 1st day of October, 1973.

/s/Myron L. Gordon
U. S. District Judge

MOTION FOR TEMPORARY RESTRAINING ORDER WITH SUPPORTING AFFIDAVIT.
Filed October 3, 1973. [Document No. 21]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

The plaintiff, by his attorney Robert H. Friebert hereby moves the court for the entry of an order restraining the defendants from conducting any further proceedings against the plaintiff, pursuant to the Notice dated June 20, 1973 (Exhibit B to Amended Complaint) and from enforcing the provisions of Sec. 448.17, Wis. Stats. on the grounds that the Notice and statute subject the plaintiff to the possibility of punishment by warning or reprimand in violation of the Constitution as alleged in the Amended Complaint.

/s/Robert H. Friebert,
Attorney for Plaintiff

[Title omitted in printing.] AFFIDAVIT

STATE OF WISCONSIN)
) SS.
MILWAUKEE COUNTY)

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says that:

1. He is the attorney for the plaintiff Duane Larkin, M.D. in the above captioned case.

2. Your affiant was notified today by Leroy Dalton, Assistant Attorney General and the attorney for the defendants in the above captioned case that the defendants intend to continue another hearing scheduled for October 4, 1973 which hearing is designated the "investigative hearing" brought pursuant to Sec. 448.17, Wis. Stats. thereby subjecting the plaintiff to the possible penalty of warning or reprimand (see Exhibit B to Amended Complaint) and, your affiant was also advised that the defendants do not consider the decision and order entered by the court on October 1, 1973 to bar them from proceeding with the "investigative hearing". Your affiant was also advised that the defendants will not conduct a "contested hearing" to enforce Sec. 448.18 (7), Wis. Stats.

3. This Affidavit is made to advise the court on the present status of the case and in support of a motion for temporary restraining order.

Dated at Milwaukee, Wisconsin, this 3rd day of October, 1973.

/s/ Robert H. Friebert
Robert H. Friebert

[Jurat omitted in printing.]

AFFIDAVIT OF ROBERT H. FRIEBERT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.
Filed October 29, 1973. [Document No. 23]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN)
) SS.
MILWAUKEE COUNTY)

ROBERT H. FRIEBERT, being first duly sworn, on oath, deposes and says that:

1. He is the attorney for the plaintiff, DR. DUANE LARKIN, in the above captioned case.

2. Attached is a copy of the Findings of Fact, Conclusions of Law and Decision of the defendants dated October 5, 1973.

3. The evidence at the hearings which were held on July 12 and 13, 1973 and October 4, 1973 discloses the following facts:

(a) Dr. Ik Hak Bae is a doctor of medicine licensed to practice medicine in Wisconsin.

(b) Dr. Krishna Murthy did not perform abortions at the plaintiff's clinic.

(c) Dr. Young Whan Ahn is a doctor who is licensed to practice medicine in the State of Georgia and was so licensed in the fall of 1972; upon information and belief, Dr. Ahn at all times was a doctor of medicine who was licensed to practice medicine in the Republic of South Korea.

(d) Dr. Benjamin Victoria is a doctor of medicine who is licensed to practice medicine in the State of Wisconsin.

(e) Dr. Larkin was present in the clinic at all material times when Dr. Ahn actually performed abortions.

(f) Dr. Ahn would perform abortions a few days a week in conjunction with Dr. Larkin.

4. This Affidavit is made in support of a Motion for a Preliminary Injunction.

Dated this 23rd day of October, 1973.

/s/ Robert H. Friebert
ROBERT H. FRIEBERT

[Jurat omitted in printing.]

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING
MEDICAL EXAMINING BOARD

In the Matter of the Investigation of the Practices of DUANE R. LARKIN, M.D., Licensee.	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

The Medical Examining Board, having conducted an investigative hearing and having heard testimony and evidence concerning the medical and surgical practices of Duane R. Larkin, M.D., on July 12 and 13 and October 4, 1973, in accordance with sec. 448.17, Stats., now makes the following

FINDINGS OF FACT

(1) That Duane R. Larkin, M.D., hereafter called the licensee, is a resident of Livonia, Michigan.

(2) That the licensee was granted license number 17697 by reciprocity with the State of Michigan to practice medicine and surgery in the State of Wisconsin on or about August 17, 1971, and that thereafter he opened an office for the practice of medicine, specializing in the performance of abortions, at 710 North Plankinton Avenue and 710 North Sixth Street, Milwaukee, Wisconsin.

(3) From on or about August 17, 1971, until on or about April 25, 1972, the licensee rented quarters and subsequently practiced medicine and surgery at 710 North Plankinton Avenue, Milwaukee, Wisconsin, under a name other than that for which he was originally licensed to practice medicine and surgery in the State of Wisconsin, to wit: Glen Johnson, and that such conduct operated to mislead the public as to his identity.

(4) From on or about August 17, 1971, until on or about May 25, 1973, the licensee counseled and advised doctors employed by him at his abortion clinic at both of the above addresses in Milwaukee, Wisconsin, to use names other than the names under which they were originally licensed to practice medicine and surgery in Wisconsin, to wit:

(a) Dr. Ik Hak Bae to use the name Dr. Rhee,

(b) Dr. Krishna Murthy, an unlicensed doctor holding a temporary educational certificate, to use the name Dr. Reamon or Ramon,

(c) Dr. Young Whan Ahn, an unlicensed doctor, to use the name Dr. Park,

and that such conduct operated to mislead the public as to the identity of the doctors involved.

(5) From on or about August 17, 1971, to on or about February 27, 1973, the licensee has split professional fees earned from abortions performed at the above addresses with Robert C. Moore of Detroit, Michigan, operator of Haven Midwest, an abortion referral agency, in payment for the patients solicited by Robert C. Moore and referred to the licensee for abortions; that the licensee had similar arrangements with other referral agencies and other individuals.

(6) That between on or about August 17, 1971, and on or about February 27, 1973, the licensee employed unlicensed persons to engage in the practice of medicine and surgery, including a Dr. Young Whan Ahn and Dr. Krishna Murthy, an unlicensed doctor holding a temporary educational certificate which limited his practice to medical training at Mount Sinai Hospital, Milwaukee, Wisconsin.

(7) That between on or about August 17, 1971, and on or about September 30, 1973, the licensee has split fees with Dr. Benjamin Victoria, Dr. Ik Hak Bae, Dr. Krishna Murthy, and Dr. Young Whan Ahn and has failed to render individual statements or accounts of his charges to patients for services of himself and other physicians.

CONCLUSIONS OF LAW

(1) That in practicing medicine and surgery under the name Glen Johnson the licensee was engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public, within the meaning of sec. 448.18 (1) (g), Stats.

(2) That in counseling and advising doctors employed by him at his abortion clinic to use names other than the names under which they were originally licensed to practice medicine and surgery in Wisconsin, the licensee has engaged in conduct

unbecoming a person licensed to practice or detrimental to the best interests of the public, within the meaning of sec. 448.18 (1) (g), Stats.

(3) That in splitting fees with referral agencies such as Haven Midwest and with other doctors, there is probable cause to believe that the licensee has violated the provisions of sec. 448.23 (1), Stats., and has engaged in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public within the meaning of sec. 448.18 (1) (g), Stats.

(4) That in permitting unlicensed persons to practice medicine and surgery there is probable cause to believe that the licensee has violated secs. 448.02 (1) and 939.05 (2) (c), Stats., and has engaged in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public within the meaning of sec. 448.18 (1) (g), Stats.

DECISION

Within the meaning of sec. 448.17, Stats., it is hereby determined that there is probable cause to believe that the licensee has violated the criminal provisions of ch. 448, Stats., and that there is probable cause for an action to revoke the license of the licensee for engaging in unprofessional conduct.

Therefore, it is the decision of this Board that the secretary verify this document and file it as a verified complaint with the District Attorney of Milwaukee County in accordance with sec. 448.18 (2), Stats., for the purpose of initiating an action to revoke the license of Duane R. Larkin, M.D., to practice medicine and surgery in the State of Wisconsin and

initiating appropriate actions for violation of the criminal laws relating to the practice of medicine.

BY THE BOARD:

/s/ Thos. W. Tormey, Jr., M.D.
Thos. W. Tormey, Jr., M.D., Secretary

[Jurat omitted in printing.]

ANSWER OF DEFENDANTS TO AMENDED COMPLAINT.
Filed November 1, 1973. [Document No. 24]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

COME NOW the defendants by their attorneys, Robert W. Warren, Attorney General of the State of Wisconsin, and LeRoy L. Dalton, Assistant Attorney General of the State of Wisconsin, and for an answer to the amended complaint served and filed herein ADMIT, DENY, and ALLEGE as to each paragraph of the amended complaint as follows:

FIRST CAUSE OF ACTION

Paragraph 1. DENY same.

Paragraph 2. ADMIT same.

Paragraph 3. ADMIT same.

Paragraphs 4 through 17. ADMIT same.

Paragraph 18. DENY same.

Paragraph 19. DENY same.

Paragraph 20. DENY same.

Paragraph 21. DENY same.

Paragraph 22. ADMIT that the Honorable James E. Doyle, District Judge, Western District of Wisconsin, restrained the Board from enforcing the abortion statute against Dr. Alfred Kennan. ALLEGE that Judge Doyle did not restrain the Board from investigating the medical and surgical practices of Dr. Alfred Kennan.

SECOND CAUSE OF ACTION

Paragraph 1. Defendants ADMIT, DENY, and ALLEGE as in the first cause of action.

Paragraph 2. DENY same.

Paragraph 3. ADMIT the first sentence thereof. DENY the second sentence thereof.

WHEREFORE, the defendants demand judgment as follows:

1. The action be dismissed, or

2. That judgment be entered declaring the procedures employed by the defendants as members of the Medical Examining Board of the State of Wisconsin embodied in the notice of investigative hearing, secs. 448.17 and 448.18, Wis. Stats., to be constitutional and in violation of no constitutional rights.

3. That judgment be entered declaring that the actions of the defendants as applied to the plaintiff are constitutional and in violation of no rights guaranteed to the plaintiff under the Constitution of the United States.

4. That judgment be entered declaring that the notice of contested hearing dated September 18, 1973, issued by the Board to Duane Larkin, M.D., and sec. 448.18 (7), Wis. Stats.,

are constitutional and not in violation of any rights guaranteed to the plaintiff by the United States Constitution.

5. That the defendants recover their costs.

6. For such other and further relief as the court may deem appropriate and proper.

Dated at Madison, Wisconsin, this 31st day of October, 1973.

ROBERT W. WARREN
Attorney General of Wisconsin

/s/ LeRoy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

Attorneys for Defendants

AFFIDAVIT OF LE ROY L. DALTON IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION.
Filed November 2, 1973. [Document No. 26]
[Title omitted in printing.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN)
) SS.
COUNTY OF DANE)

LeRoy L. Dalton, Assistant Attorney General, being first duly sworn, on oath deposes and says:

(1) That he is the attorney for the defendants in this action.

(2) That he attended the hearings before the Medical Examining Board on July 12 and 13 and October 4, 1973, heard the testimony, and has reviewed all transcripts of testimony excepting three witnesses who testified on October 4.

(3) That this affidavit is made for the purpose of advising the court as to your affiant's understanding of the evidence produced at the above hearings, as follows:

(a) Dr. Krishna Murthy did not perform abortions but did engage in acts constituting the practice of medicine within the meaning of ch. 448 of the Wisconsin Statutes.

(b) Dr. Young Whan Ahn worked at Dr. Larkin's abortion clinic from late 1971 until January or February of 1973. During that period of time he was not licensed to practice medicine in Wisconsin and the evidence in the record indicates that he was not licensed to practice medicine anywhere until November of 1972 when he received a license from the State of Georgia. The evidence does indicate that he graduated from Kyung-Pook University Medical College in Korea, but there is no evidence that he was ever licensed to practice medicine in that country.

(c) There is direct testimony from a Mrs. Carlene Carr that Dr. Larkin was not present in the clinic at all material times when Dr. Ahn actually performed abortions.

(d) To state that Dr. Ahn would perform abortions a few days a week in conjunction with Dr. Larkin is to completely mislead the court as to the nature of Dr. Larkin's operation, which consisted mostly of Friday, Saturday, and Sunday work. The testimony clearly indicates that

Dr. Larkin commuted between Detroit and Milwaukee and spent only weekends in Milwaukee. Dr. Ahn was identified by more than one witness as the principal abortionist in the clinic. The testimony indicates that by far he performed more abortions than any other person, including Dr. Larkin.

(e) The testimony indicates that Dr. Larkin does not regularly perform abortions at his clinic anymore; that he has been in Milwaukee only once since about February, 1973, and has Dr. Benjamin Victoria employed at a percentage of the gross income of the clinic to perform the abortions.

(4) This affidavit is submitted in response to the affidavit of plaintiff's counsel and in opposition to the motion for a preliminary injunction.

Dated at Madison, Wisconsin, this 1st day of November, 1973.

/s/ Le Roy L. Dalton
LE ROY L. DALTON
Assistant Attorney General

Attorney for the Defendants
Room 114 East, State Capitol
Madison, Wisconsin 53702
Telephone: 608-266-3863

[Jurat omitted in printing.]

DECISION OF THE THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN. Filed December 21, 1973. [Document No. 29]

This decision is printed in the Appendix to the Jurisdictional Statement at pages 2-4.

JUDGMENT ON DECISION BY THE COURT. Filed January 31, 1974. [Document No. 33]

This judgment is printed in the Appendix to the Jurisdictional Statement at pages 4-5.

NOTICE OF APPEAL. Filed March 1, 1974. [Document No. 35]

The notice of appeal is printed in the Appendix to the Jurisdictional Statement at pages 6-7.